

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

PETITION OF CINERGY COMMUNICATIONS)	
COMPANY FOR ARBITRATIONS OF AN)	CASE NO.
INTERCONNECTION AGREEMENT WITH)	2001-00432
BELLSOUTH TELECOMMUNICATIONS, INC.)	
PURSUANT TO U.S.C. SECTION 252)	

O R D E R

On December 10, 2001, Cinergy Communications Company ("Cinergy") filed a petition requesting that this Commission arbitrate disputed issues concerning its interconnection agreement with BellSouth Telecommunications, Inc. ("BellSouth"). The parties have met with Commission Staff in an informal conference, a hearing was held on May 22, 2002, and post-hearing briefs have been filed. The case is now ripe for decision.

The parties dispute whether BellSouth should be required to furnish to Cinergy, on an unbundled network element ("UNE") basis, certain network elements, including the digital subscriber line access multiplexer ("DSLAM") port and broadband transport, that will enable Cinergy to configure and provide innovative services in Kentucky. Cinergy proposes to use these UNEs to offer a network service providing three or four voice lines and high speed Internet access using the copper pair loop. Cinergy also objects to BellSouth's current policy of refusing to provide its digital subscriber line ("DSL") Internet service to customers who choose a competitive local exchange carrier ("CLEC") that provides voice service over the UNE platform ("UNE-P"). BellSouth contends that it cannot, as a matter of law, be required to provide the UNEs requested.

It also notes that the FCC has not required it to provide DSL over facilities leased by a competitor.¹

We have jurisdiction over the UNE issues presented pursuant to 47 U.S.C. • 252(e) (giving state commissions authority over, *inter alia*, interconnection disputes) and § 251(d)(3) (giving state commissions authority to establish access and interconnection obligations of incumbent local exchange carriers ("ILEC"), including unbundling obligations in addition to those imposed by the Federal Communications Commission ["FCC"]). We also have jurisdiction over the issue of whether BellSouth acts reasonably in refusing to provide DSL service to CLEC UNE-P customers under, *inter alia*, 47 U.S.C. § 252(e) and KRS 278.280. The FCC's determination on this issue is not, and does not purport to be, preemptive. The state commission in Florida previously prohibited as anti-competitive and discriminatory the practice to which Cinergy objects here.²

COLLATERAL ESTOPPEL

We first address the issue of whether the doctrine of collateral estoppel bars consideration of Cinergy's complaint concerning BellSouth's refusal to provide DSL service when a customer is served by a CLEC over UNE-P. The complaint brought by Cinergy here, that BellSouth's practice is discriminatory and anti-competitive, was brought by several CLECs in *In the Matter of Joint Application by BellSouth Corp., et al.*

¹ BellSouth Post-Hearing Brief at 2 (citation omitted).

² *In re: Petition by Florida Digital Network, Inc. for Arbitration of Certain Terms and Conditions of Proposed Interconnection and Resale Agreement with BellSouth Telecommunications, Inc. under the Telecommunications Act of 1996*, Docket No. 010098-TP (June 5, 2002).

For Provision of In-Region, InterLATA Services in Georgia and Louisiana, CC Docket No. 02-35 (May 15, 2002). The FCC rejected the argument that the practice is discriminatory, and has imposed no requirement that an ILEC must provide DSL service over UNE-P lines.

Both BellSouth and Cinergy state, in their post-hearing briefs, that collateral estoppel does not apply here because Cinergy itself did not raise the issue in the FCC proceeding.³ We agree, and find that the issue is not subject to the collateral estoppel doctrine.

**ACCESS TO PACKET-SWITCHING UNES FOR
THE PROVISION OF BROADBAND SERVICE**

Our legal analysis begins with applicable provisions of the Telecommunications Act of 1996, 47 U.S.C. § 251(c)(3) (requiring an ILEC to furnish "nondiscriminatory access to network elements on an unbundled basis") and 47 U.S.C. § 251(d) (requiring the FCC to consider, in promulgating regulations, whether access to such UNEs "as are proprietary in nature" is "necessary" and whether the failure to provide access to those UNEs would "impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer"). As UNEs used to provide broadband services are at issue here, we must also take into consideration the recent decision of the United States Court of Appeals for the District of Columbia Circuit, 290 F.3d 415 (D.C. Cir. 2002) (invalidating certain unbundling requirements established by the FCC and finding relevant to the issue of unbundling packet-switching the market penetration

³ See, e.g., BellSouth's Post-Hearing Brief at 1-2 (citations omitted).

of cable companies). The parties interpret these authorities, as well as others, very differently.

Cinergy claims that it is entitled to, and should as a matter of policy be permitted to obtain, the UNEs necessary to enable it to provide to residential and small business customers new products using broadband technology. It notes that it proposes to use these UNEs to provide in Kentucky, as it plans to provide in Indiana, telecommunications services that are not offered by BellSouth. It also argues that it will be impaired in its ability to provide those telecommunications services unless it can obtain packet-switching UNEs from BellSouth because it is cost-prohibitive to buy and co-locate its own equipment. Cinergy contends that this Commission should reject BellSouth's argument that Cinergy is not entitled to the UNEs because it did not share the risk in building them. Cinergy argues that there was little risk to BellSouth in its DSL buildout because it built these facilities with several million dollars that would otherwise, under BellSouth's price cap plan, have been returned to ratepayers.⁴ Cinergy lacks such a subsidy. Cinergy also notes that BellSouth stated, in its request to retain the money that would otherwise have been refunded to its customers, that it would not be financially reasonable to build out DSL facilities into rural areas and that, absent the subsidy, it would not do so.⁵ According to Cinergy, BellSouth has thus made Cinergy's "business case" for not building its own facilities into rural areas. Cinergy also quotes

⁴ Post-Hearing Brief of Cinergy Communications Company ("Cinergy Post-Hearing Brief"), at 13-14, citing Case No. 1999-00434, *In the Matter of Review of BellSouth Telecommunications, Inc.'s Price Regulation Plan* (Order dated August 3, 2000).

⁵ Cinergy Post-Hearing Brief at 14.

prices for the purchase of necessary equipment to demonstrate that building its own facilities is not a viable option.

BellSouth, on the other hand, asserts that it cannot lawfully be required to provide to CLECs packet-switching UNEs. BellSouth contends that Cinergy does not need these UNEs to provide the services it seeks to offer, and contends that Cinergy should buy its own equipment and co-locate that equipment in BellSouth's central offices. Cinergy is not entitled to purchase these elements because, BellSouth argues, it shared none of the economic risk in the build-out. BellSouth asserts that it has no incumbent advantage in the broadband market, and cites *USTA v. Federal Communications Comm'n* in support of its argument that being forced to provide UNEs to support DSL service creates a disincentive to invest in new technology.

BellSouth also cites *USTA* in support of its argument that Cinergy is not "impaired" under 47 U.S.C. § 251(d) in its attempt to offer DSL because it has produced no evidence regarding the competition BellSouth faces from cable services offering broadband. BellSouth notes that neither the FCC nor other state commissions in its region have ordered the unbundling of packet switching. It also argues that inability to obtain packet-switching as a UNE from BellSouth will not "impair" Cinergy's ability to offer the telecommunications services it seeks to offer because [1] BellSouth faces broadband competition from cable providers,⁶ and [2] Cinergy can expend the capital to build its own facilities for a reasonable price that will enable it to survive financially. It states that the prices Cinergy has quoted are exaggerated and that they include payments to BellSouth that, in fact, Cinergy would not be required to remit.

⁶ BellSouth's Post-Hearing Brief at 13.

BellSouth correctly summarizes the D.C. Circuit's concerns regarding the wisdom of the FCC's having unbundled packet-switching without having first examined the entire competitive context. It is not, however, clear that the D.C. Circuit ruled that the level of a CLEC's "impairment" under the statute is to be based upon an analysis of the competition faced by the ILEC. Nevertheless, we conclude that the court's discussion of cable competition is to the point here, as is its concern that unbundling packet-switching will create a disincentive for ILEC investment in these technologies. Cinergy argues that BellSouth's risk in its broadband rollout has been considerably alleviated by its retention of monies that it would otherwise have refunded to its customers. Cinergy also questions the applicability of the D.C. Circuit's *USTA* rationale in Kentucky, where BellSouth's incentive to invest was underwritten by Kentucky ratepayers. The argument is persuasive, as far as it goes. However, we must look to the long-term effects upon Kentucky of creating a packet-switching UNE. Future investments by BellSouth, beyond those mandated in, and subsidized pursuant to, Case No. 1999-00434, would be discouraged. Moreover, Kentucky's other ILECs might question the wisdom of investment in packet-switching if the returns on such investment would be required to be shared with competitors.

Even if we were inclined to unbundle packet-switching, we would not do so on the record in this case. We have no evidence in the record of cable or other broadband penetration in the relevant markets. Nor do we believe Cinergy has demonstrated that obtaining additional UNEs from BellSouth is "necessary" to enable it to provide service. While Cinergy is entitled to purchase DSL-capable loops, it should purchase its own additional equipment to provide the broadband services it seeks to offer.

ISSUES RAISED BY BELL SOUTH'S REFUSAL TO PROVIDE BROADBAND SERVICES TO A CUSTOMER OF A CLEC PROVIDING SERVICE BY UNE-P OR TO ISSUE A BILL FOR BELL SOUTH DSL SERVICES TO CUSTOMERS OF RESELLERS

Cinergy objects to BellSouth's policy of refusing to provide DSL service to a customer who obtains his voice service from a CLEC that provides service by means of UNE-P. The practice is, Cinergy claims, anticompetitive in that it enables BellSouth to leverage its FastAccess ISP service, which cannot be resold by a CLEC, to leverage control over the voice market. Cinergy claims that it has lost customers to this practice. Cinergy also objects to BellSouth's billing system, pursuant to which a customer who has a competitor's phone number can be billed for BellSouth's DSL service only by credit card.

BellSouth defends its policy of cutting off its DSL service to a customer who switches his voice service to a CLEC that buys UNE-P from BellSouth. First, BellSouth notes that the FCC has not prohibited the practice. Next, BellSouth argues that, since it will provide DSL service over a *resold* line, it is not necessary for CLECs and their customers for DSL service to be available over a *UNE-P* line. BellSouth desires to provide DSL services over only those lines over which it retains ownership and control.

We are not persuaded by BellSouth's arguments. Its practice of tying its DSL service to its own voice service to increase its already considerable market power in the voice market has a chilling effect on competition and limits the prerogative of Kentucky customers to choose their own telecommunications carriers. Further, since the passage of the Telecommunications Act of 1996 we have supported CLECs' rights to obtain the UNE-P to provide voice service. BellSouth's practice of denying DSL to a CLEC's UNE-

P customers undercuts our own long-held policy and, in the long run, will result in fewer viable CLECs, and thus fewer customer options. Accordingly, this practice must cease.

Next, we address issues involving BellSouth's billing system as it relates to DSL service to CLEC customers.⁷ The billing system does not permit DSL services to be billed separately to customers of CLECs. In order to retain their DSL services, customers who switch to a reseller CLEC must be billed by credit card. BellSouth states it should not be required to change its billing system to provide a written bill to a customer who has not chosen BellSouth for his voice service, and explains that Internet service providers routinely bill via customer credit cards.

We do not find it necessary to require BellSouth to change its billing system as requested by Cinergy. BellSouth correctly notes that its alternative billing method for CLEC customers, billing by credit card, is common in the industry. BellSouth's status as an ILEC should not require special measures in this regard.

The Commission being sufficiently advised, IT IS THEREFORE ORDERED that:

1. Cinergy's request for unbundled packet-switching is denied.
2. BellSouth shall not refuse to provide its DSL service to a customer on the basis that the customer receives voice service from a CLEC that provides service by means of UNE-P.
3. Cinergy's request that BellSouth alter its billing system to permit DSL billing by some means other than by BellSouth telephone number or credit card is denied.

⁷ We note that the DSL customers at issue are those served by resold lines rather than by UNE-P. As described elsewhere in this Order, BellSouth refuses to provide DSL to customers whose CLECs provide service by UNE-P.

4. Within 20 days of the date of this Order, the parties shall file their final interconnection agreement containing terms consistent with this Order.

Done at Frankfort, Kentucky, this 12th day of July, 2002.

By the Commission

CONCURRING AND DISSENTING OPINION OF
CHAIRMAN MARTIN J. HUELSMANN

I concur in the majority opinions on the collateral estoppel, access to packet switching and billing issues. I am, however, forced to dissent on the issue of BellSouth's refusal to provide Broadband services to a customer of a CLEC who is providing voice service via UNE-P. First, I believe that in July of 2002 one of the most important things for regulators to consider is "regulatory certainty." Utilities are constantly being regulated both at a federal and state level. In order for the utilities to effectively function in today's society, it is necessary that they know what the regulators are going to do. On May 15, 2002, the FCC ruled that the refusal to provide DSL service over a CLEC's UNE-P line was not anti-competitive and discriminatory. The FCC said, "We reject these claims because, under our rules, the incumbent LEC has no

obligation to provide DSL service over the competitive LEC's leased facilities..(w)e cannot agree with commenters that BellSouth's policy is discriminatory."⁸

The majority today tells BellSouth that, while at the federal level you can refuse, at the Kentucky state level you cannot refuse. Such is pure and simple regulatory uncertainty. This Commission in the past has given deference to the FCC and ruled consistently with the FCC. On August 3, 2000, BellSouth agreed to certain commitments for DSL deployment (30 central offices). They deployed in not only 30, but in over 90 offices. With this decision not only do we have regulatory uncertainty but we have a situation in which there is less incentive for BellSouth to deploy broadband throughout the state. Economic development will be curtailed.

Secondly, there is an absence of any testimony showing any harm to Cinergy. What Cinergy wants to do is receive UNE rates rather than resale rates. There is no evidence in the record concerning the total costs to be paid by Cinergy to sell service by means of UNE-P; the record is devoid of any evidence on provisioning, maintenance and other variable costs that Cinergy will have to pay. Accordingly, I do not find even a scintilla of evidence presented by Cinergy, much less a preponderance, to show that Cinergy would be losing money by purchasing BellSouth's voice service at the resale rate.

Next, I must state my concern with practices in which Cinergy has engaged. The record reflects that Cinergy has purposely sold ADSL to 50 customers only in anticipation of a favorable ruling of this Commission and to test the product. Cinergy

⁸ Memorandum Opinion and Order, In the Matter of Joint Application by BellSouth Corp., et al. For Provision of In-Region, Inter ALTA Services in Georgia and Louisiana, CC Docket No. 02-35 (May 15, 2002), at Section 175.

says that if this Commission rules against it, it will be forced to either return these customers to BellSouth or to raise rates to an uncompetitive level. I can only assume that prior to selling their services they gave full disclosure to their customers.

In addition, Cinergy consistently stated in the hearing that is a "small company" that has no business plan when it comes to selling DSL. I have serious reservations as to why a company would sell something without having any business plan. I also find it inconceivable that, in 2002:

- 1) A CLEC would plan to sell DSL without a market research study on the desire for DSL.

- 2) A CLEC planning to sell DSL would be unaware of, and apparently not care about, the national "take rate" for DSL.

- 3) A CLEC would assume, for its business case, that over the first two years it offered DSL, 50 percent of the DSL customers would be residential at a cost of \$79.95 and 50 percent at \$49.95 residential.

- 4) A CLEC's CEO would not know the number of lines in Kentucky (he has been in this business since 1984).

- 5) The witness of a CLEC making an argument before a state commission would not have read, or become familiar with, an FCC decision on the same issue (here, the Georgia/Louisiana 271 case where the FCC rejected the argument that refusal to provision DSL over a CLEC's UNE-P line is discriminatory).

- 6) A CLEC wishing to sell DSL would not know what "super app" means.

- 7) A CLEC would state that a majority of its customers demand high speed Internet access, yet be unable to describe who those customers are.

8) A CLEC would admit that it has no business case for ADSL for residential. Last, but certainly not least, BellSouth's decision to deny its DSL service to a customer who chooses a CLEC is a business decision. I find persuasive BellSouth's argument that it is entitled to provide its DSL service over only those lines it controls. Moreover, BellSouth's policy does not deny a customer the option to choose a CLEC for voice service; it simply requires a CLEC wishing to keep a customer to become a reseller of BellSouth service rather than a UNE-P provider.

Accordingly, I would deny Cinergy's request.



Martin J. Huelsmann
Chairman

ATTEST:



Executive Director

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

PETITION OF CINERGY COMMUNICATIONS)	
COMPANY FOR ARBITRATION OF AN)	CASE NO.
INTERCONNECTION AGREEMENT WITH)	2001-00432
BELLSOUTH TELECOMMUNICATIONS, INC.)	
PURSUANT TO U.S.C. SECTION 252)	

O R D E R

On July 12, 2002, the Commission, by Order, addressed the disputed issues between Cinergy Communications Company ("Cinergy") and BellSouth Telecommunications, Inc. ("BellSouth") in this arbitration proceeding. The parties disputed whether BellSouth should be required to furnish to Cinergy, on an unbundled network element ("UNE") basis, certain network elements, including the digital subscriber line access multiplexer ("DSLAM") port and broadband transport. The Commission concluded that unbundling packet-switching would create a disincentive for investment in these technologies by incumbent local exchange carriers ("ILECs"). The provision of packet-switching as a UNE may, in the long term, discourage future investments by BellSouth and by Kentucky's other ILECs if those investments would be required to be shared with competitors. Thus, as a matter of public interest, the Commission denied Cinergy's request to unbundle packet-switching as a UNE.

The parties also disputed whether BellSouth should continue its current policy of refusing to provide its digital subscriber line ("DSL") service to customers who choose a competitive LEC ("CLEC") for voice utilizing the UNE platform ("UNE-P"). The Commission found that BellSouth's practice of denying DSL to a CLEC's UNE-P

customers undercuts the Commission's long-held policy of encouraging UNE-based voice competition and, in the long run, would result in fewer viable CLECs and fewer customer options. The Commission ordered the practice to cease.

BellSouth and Cinergy have both applied for clarification or rehearing of the Commission's Order. Cinergy has requested rehearing of the issue of unbundling packet-switching as a UNE. BellSouth and Cinergy both have requested clarification of the Commission's decision concerning provision of BellSouth DSL service over CLEC UNE-P lines. BellSouth prefers that the Commission reconsider its decision but, in the alternative, asks for clarification. On August 21, 2002, the Commission granted the motions for clarification of BellSouth and Cinergy in order to clarify the July 12, 2002 Order. The Commission's determinations in this arbitration proceeding are clarified herein.

Cinergy asserts that the Commission failed to apply the "necessary" and "impair" analysis required by 47 U.S.C. Section 251(d)(2) and as delineated by the U. S. Court of Appeals for the District of Columbia in United States Telephone Association v. Federal Communications Commission, 290 F.3d 415 (D.C. Circuit 2002). However, the Commission's July 12, 2002 Order clearly states that the record in this case does not establish that Cinergy's obtaining UNEs in addition to DSL-capable loops is "necessary" to enable it to provide service. That Order also explains that packet-switching will not be required to be unbundled in Kentucky as a matter of public interest. The Commission expressed concern that unbundling packet-switching would create

disincentives for ILEC investment and, accordingly, would be detrimental to Kentucky. Cinergy has presented no new evidence which would alter the Commission's decision.¹

Next, Cinergy asks that the Commission's July 12, 2002 Order be clarified to indicate that BellSouth may not refuse to provide its DSL service whether via the BellSouth product, FastAccess, or through a wholesale DSL transport that BellSouth provides to all network service providers. BellSouth, on the other hand, asks that the Commission clarify the Order to indicate that BellSouth may not refuse to provide FastAccess service to a customer on the basis that that customer receives voice service from a CLEC that provides service via UNE-P. Moreover, BellSouth requests that this be limited to circumstances in which the customer has FastAccess service before he switches from BellSouth to a CLEC for voice service. BellSouth states its intention to comply with the Order to this extent, but to install a new loop facility over which it will provide FastAccess. BellSouth states that it plans to impose upon CLEC customers an additional charge beyond that imposed on its own voice customers.

BellSouth also asserts that the issue of DSL over the UNE-P was not properly before the Commission. We disagree. The issue is directly related to Cinergy's issue

¹ In the future, the Commission may consider evidence regarding the cable industry in Kentucky and the viability of alternatives for the delivery of voice-over broadband. However, an arbitration proceeding, limited by 47 U.S.C. Section 252 (b)(4)(C) to 9 months from the request to negotiate, is not an appropriate avenue for such an inquiry.

No. 7 in the original petition; it was addressed in many filings and at the hearing in this proceeding. Moreover, the determinations reflect the policy of this Commission.²

Our decision reflects our concern for voice customers in Kentucky as well as for the preservation of telecommunications competition and the availability of DSL to Kentucky's citizens. However, we have considered our earlier ruling in this case and modify it as follows: As we do not regulate information services, we will not require BellSouth to provide BellSouth.net's retail FastAccess service. However, a Kentucky customer must be able to obtain DSL service regardless of the voice carrier he chooses. Accordingly, BellSouth may not refuse to provide DSL pursuant to a request from an Internet service provider who serves, or who wishes to serve, a customer who has chosen to receive voice service from a CLEC that provides service over the UNE-P.

As a final matter, the Commission finds BellSouth's proposal to provide DSL to CLEC customers over a separate loop, and to charge accordingly, unacceptable. Additional facilities would create inefficiencies and would create unnecessary costs for the customer. There is no evidence that the provision of DSL and voice over the same loop is not technically feasible. There is, however, every indication that imposing charges upon CLEC voice customers that BellSouth voice customers would not have to pay would have the same anti-competitive result as the practice our original Order rejected.

² See Administrative Case No. 382, An Inquiry Into the Development of Deaveraged Rates for Unbundled Network Elements, Order dated December 18, 2001 at 36 which states, "The Commission also makes clear in this Order that ordinarily combined UNEs must also be made available where line-splitting occurs. Line-splitting must be made available to all CLECs on a nondiscriminatory basis. Moreover, BellSouth may not discontinue the provision of line-splitting when a CLEC provides voice service through UNE-P, regardless of which xDSL provider is used." BellSouth did not contest this Commission ruling.

The Commission, having considered the motions and having been otherwise sufficiently advised, HEREBY ORDERS that:

1. To protect the provision of competitive voice service in Kentucky, BellSouth shall not refuse to provide any DSL service to a customer on the basis that a customer receives UNE-P-based voice service from a CLEC.

2. BellSouth shall not require a DSL customer to pay loop costs of a separate loop simply because the customer receives voice from a competitor on a UNE-P basis.

3. Within 20 days of the date of this Order, the parties shall file their final interconnection agreement containing terms consistent with the July 12, 2002 Order as modified by this Order.

Done at Frankfort, Kentucky, this 15th day of October, 2002.

By the Commission

ATTEST:


Executive Director

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

PETITION OF CINERGY COMMUNICATIONS)	
COMPANY FOR ARBITRATION OF AN)	CASE NO.
INTERCONNECTION AGREEMENT WITH)	2001-00432
BELLSOUTH TELECOMMUNICATIONS, INC.)	
PURSUANT TO U.S.C. SECTION 252)	

O R D E R

This matter arises upon the parties' inability to agree on language for their interconnection agreement regarding certain issues which the Commission arbitrated. The Commission required that BellSouth Telecommunications, Inc. ("BellSouth") shall not refuse to provide its digital subscriber line ("DSL") to a customer on the basis that the customer receives voice service from a competitive local exchange carrier ("CLEC") that provides service by a means of unbundled network element platform ("UNE-P").¹ Upon motions for clarification by Cinergy Communications Company ("Cinergy") and BellSouth, the Commission clarified its Order to state that BellSouth may not refuse to provide DSL pursuant to a request from an Internet service provider who serves, or who wishes to serve, a customer who has chosen to receive voice service from a CLEC that provides service over the UNE-P. Moreover, BellSouth shall not require a DSL to pay loop costs of a separate loop simply because the customer receives voice from a competitor on a UNE-P basis.²

¹ Order dated July 12, 2002.

² Order dated October 15, 2002.

The language contained in Appendix A, attached hereto and incorporated herein, should be the language appearing in the parties' interconnection agreement for reasons stated herein.

Regarding ¶ 2.10.1.1, the Commission will permit the definitions of relevant terms to remain as requested by BellSouth. However, the Commission will require the addition of language ensuring that those terms are as defined in the Federal Communications Commission tariff as of the date of this Order. Regarding Cinergy's proposed ¶ 2.10.1.1.2, the Commission finds this provision a reasonable safeguard for Cinergy. Paragraph 2.10.1.3 memorializes BellSouth's lack of obligation to provide its retail, DSL-based high-speed access service to an end-user that receives UNE-P-based voice services from Cinergy. The Commission will require, however, that BellSouth notify the end-user at least 10 days prior to discontinuing its retail, DSL-based high-speed Internet access service as proposed by Cinergy. Paragraphs 2.10.1.4 and 2.10.1.5 are not in dispute and thus have been included as proposed.

Paragraph 2.10.1.6 addresses BellSouth's obligations to Cinergy prior to BellSouth's completion of the modifications of its systems and processes to comply with the Commission's Orders. After reviewing both parties' proposals, the Commission finds that the language contained in Appendix A at ¶ 2.10.1.6 is most appropriate in addressing the concerns of both parties. The parties do not dispute the language provided in ¶ 2.10.1.7 in the attached Appendix.

Paragraph 2.10.1.8 requires Cinergy to cooperate with BellSouth in an effort to determine loop makeup and qualification status when a request is made for DSL on an existing Cinergy UNE-P line. The Commission has required that the procedure for doing so should be reduced to writing.

BellSouth proposed that Cinergy be required to determine whether DSL transport was on the line which was to be converted and if so to notify BellSouth of the existence of DSL on the line. BellSouth should determine if DSL service is on a BellSouth voice line or resold line, not Cinergy. The Commission finds that this language should not be included in the parties' agreement.

BellSouth requested the insertion of a paragraph that it not be obligated to pay self-effecting evaluation measures ("SEEM") penalties for delays in provisioning UNE-P resulting from the tariffed DSL being converted from a BellSouth resold voice line to Cinergy UNE-P. An arbitration proceeding and the resulting interconnection agreement is not an appropriate context in which to relieve BellSouth of SEEM penalties. If BellSouth believes penalties are unwarranted, it should seek relief in Case No. 2001-00105.³

The Commission, having been otherwise sufficiently advised, HEREBY ORDERS that, within 20 days of the date of this Order, BellSouth and Cinergy shall file their final interconnection agreement containing terms consistent with our July 12, 2002 Order, our October 15, 2002 Order, and the attached Appendix A.

³ Case No. 2001-00105, Investigation Concerning The Propriety of Provision of InterLATA Services by BellSouth Telecommunications, Inc., Pursuant to the Telecommunications Act of 1996.

Done at Frankfort, Kentucky, this 28th day of February, 2003.

By the Commission

ATTEST:

A handwritten signature in black ink, appearing to read "Thomas H. [unclear]", written over a horizontal line.

Executive Director

APPENDIX A

APPENDIX TO AN ORDER OF THE KENTUCKY PUBLIC SERVICE COMMISSION IN CASE NO. 2001-00432 DATED February 28, 2003

2.10.1.1 For purposes of this Section 2.10.1.1, the term "DSL," "DSL transport," or "DSL Transport Services" shall mean that DSL transport service in the BellSouth F.C.C. Number 1 tariff in effect as of the date of this Order. In order to comply with the Kentucky Public Service Commission's Order in Case No. 2001-00432, BellSouth shall not refuse to provide any DSL transport service to a network service provider pursuant to a request from such network service provider who serves, or desires to serve, an end-user that receives UNE-P-based voice services from Cinergy Communications. However, BellSouth shall have no obligation to provide DSL transport on any loop that is not qualified for DSL, provided that BellSouth shall not make a change to any loop so as to make it not qualify for DSL on the basis of that such loop is being converted to UNE-P, rather than on the basis of architectural, mechanical, or physical limitations.

2.10.1.2 The Kentucky Public Service Commission's Order in Case No. 2001-00432 is predicated upon the ability of customers of Cinergy Communications to receive wholesale ADSL transport at the same price it was available pursuant to BellSouth Tariff F.C.C. Number 1 on the date of that Order. In the event this offering is no longer available for any reason, BellSouth agrees to provide to Cinergy Communications a wholesale ADSL transport product for the duration of this interconnection agreement on the same pricing, terms, and conditions as those in the BellSouth Tariff F.C.C. Number 1 as of the date of the Order subject to Section 2.10.1.1 above. The terms and prices of BellSouth Tariff F.C.C. Number 1 as it existed on the date of the Order are incorporated herein by reference as necessary to comply with this section.

2.10.1.3. Notwithstanding the foregoing, BellSouth shall have no obligation to provide its retail, DSL-based high-speed Internet access service, currently known as BellSouth FastAccess® DSL service, to an end-user that receives UNE-P-based voice services from Cinergy. To the extent BellSouth chooses to deny FastAccess® to an end-user, BellSouth shall not seek any termination penalties against, or in any other fashion seek to penalize, any such end-user that Cinergy identifies to BellSouth pursuant to a process to be agreed upon and reduced to writing. BellSouth shall also notify the aforementioned end-user at least 10 days prior to discontinuing its FastAccess® service.

2.10.1.4. Cinergy shall make available to BellSouth at no charge the high frequency spectrum on UNE-P for purposes of enabling BellSouth to provision DSL transport on the same loop as the UNE-P-based voice service.

2.10.1.5. When BellSouth provides tariffed DSL transport over Cinergy UNE-P, BellSouth shall have the right, at no charge, to access the entire loop for purposes of troubleshooting DSL-related troubles.

2.10.1.6. BellSouth shall not be obligated to provide tariffed DSL transport in accordance with this Section 2.10.1 until completion of the modification of systems and processes that will enable BellSouth to qualify Cinergy UNE-P lines for DSL as well as maintain and repair such DSL on Cinergy UNE-P lines. Until such time as BellSouth completes the aforementioned modification of systems and processes, BellSouth agrees to provide to Cinergy Communications wholesale DSL transport service over resale lines on the following conditions: (1) the underlying resale line and its features shall be provided by BellSouth to Cinergy Communications at the rate that Cinergy Communications normally pays for a UNE-P loop/port combination in the pertinent UNE zone; (2) BellSouth shall assign all right to carrier access charges to Cinergy Communications and shall provide detailed CABS records to Cinergy Communications free of charge; (3) because BellSouth cannot provide hunting between resale and UNE-P lines, any other lines of the end-user served by Cinergy Communications shall also be converted to resale at no charge upon submission of an LSR for such conversion and provided pursuant to (1) and (2) above unless and until BellSouth agrees to provide hunting between resale and UNE-P platforms; and (4) once the aforementioned modification of systems and process is completed, BellSouth agrees to convert all end-user lines affected by this section to UNE-P at no charge upon Cinergy Communications' submission of an executable LSR for such conversion.

2.10.1.7. Cinergy Communications shall provide BellSouth with all current pertinent customer information necessary for BellSouth to comply with this section. Cinergy Communications authorizes BellSouth to access customer information on BellSouth systems as necessary for BellSouth to comply with this section. BellSouth shall provide Cinergy Communications with all current pertinent loop information necessary for Cinergy Communications to provide DSL over UNE-P, including but not limited to, loop qualification information for UNE-P lines.

2.10.1.8. If a request is made for DSL on an existing Cinergy Communications UNE-P line, Cinergy shall cooperate with BellSouth in an effort to determine loop make-up and qualification status. The parties shall mutually agree on a procedure and shall reduce same to writing.